ROBERT H. REXRODE, III
California State Bar No. 230024
427 C Street, Suite 300
San Diego, California 92101
Telephone: (619) 233-3169, Ext. 13
Facsimile: (619) 684-3553
robert_rexrode@rexrodelawoffices.com

Attorney for Mr. Jose Baudilo Gastelum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(**HONORABLE PETER C. LEWIS**)

UNITED STATES OF AMERICA, Plaintiff, v. JOSE BAUDILIO GASTELUM, Defendant.	)	CASE NO. 08mj8509 DATE: June 19, 2008 TIME: 1:30 p.m. **PLACE: United States District Courthouse, El Centro, Ca.** NOTICE OF DEFENDANT'S REPLY TO GOVERNMENT'S RESPONSE

TO: KAREN P. HEWITT, UNITED STATES ATTORNEY,
CHARLOTTE KAISER, ASSISTANT UNITED STATES ATTORNEY, AND
JOHN WEIS, ASSISTANT UNITED STATES ATTORNEY:

PLEASE TAKE NOTICE that on June 19, 2008, at 1:30 p.m., **at the United States District Courthouse in El Centro, California**, or as soon thereafter as counsel may be heard, the defendant, Jose Gastelum, by and through his counsel, Robert Rexrode, will ask this Court to consider this Reply to the Government's Response.

Respectfully submitted,

Dated: June 18, 2008

/s/ Robert H. Rexrode
ROBERT H. REXRODE, III
Attorney for Mr. Gastelum
robert_rexrode@rexrodelawoffices.com

ROBERT H. REXRODE, III
California State Bar No. 230024
427 C Street, Suite 300
San Diego, California 92101
Telephone: (619) 233-3169, Ext. 13
Facsimile: (619) 684-3553
robert_rexrode@rexrodelawoffices.com

Attorneys for Mr. Jose Baudilo Gastelum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(**HONORABLE PETER C. LEWIS**)

UNITED STATES OF AMERICA, Plaintiff, v. JOSE BAUDILIO GASTELUM, Defendant. ___________________________________	)))))))))	CASE NO. 08mj8509 STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTIONS.

I.

PROCEDURAL HISTORY

On June 13, 2008, Mr. Gastelum filed a limited discovery motion and a limited preservation motion with this Court. On June 18, 2008, Mr. Gastelum received the government's response to his limited motions. This reply follows.

II.

REPLY TO GOVERNMENT'S RESPONSE

In its response, the government chooses not to address the substance or merits of Mr. Gastelum's limited discovery and preservation motions. *See* United State's Response to Defendant's Motions. Rather, the government states that this Court does not have the power to hear Mr. Gastelum's motions. *Id*. The government is wrong.

Magistrate Courts unquestionably have the power to hear "non-dispositive" matters. Fed. R. Crim. Pro. 59 (a). A discovery motion is a non-dispositive matter. *Cf. United States* *v. Bogard*, 846 F.2d 563, 567-68 (9th Cir. 1988) (discussing magistrate judge's discovery rulings). In the statute authorizing the creation of magistrate judges, 26 U.S.C. § 636, a discovery motion is neither listed as a type of motion that magistrate judges are prohibited from hearing, nor is it analogous to any of those listed motions. *See* 26 U.S.C. § 636 (b)(1)(A); *see also Maisonville v. F2 America, Inc.*, 902 F.2d 746, 748 (9th Cir. 1990) ("any motion not listed [in 26 U.S.C. § 636 (b)(1)(A)], nor analogous to a motion listed in this category, falls within the non-dispositive group of matters which a magistrate may determine"). There is clearly no statutory bar to this Court hearing Mr. Gastelum's motions.

Nonetheless, the government argues that "[b]ecause a district judge has not referred Defendant's Motions to the Court, they cannot be heard at this time." *See* United State's Response to Defendant's Motions. This assertion by the government is incorrect—first, as a matter of interpretation of the local rules, and second, as a matter of due process.

Under the local rules applicable to this judicial district, magistrate judges have the enumerated power to "[p]erform any additional duty not inconsistent with the Constitution and laws of the United States." Crim. L.R. 57.4 (c)(11). As discussed immediately above, ruling on a non-dispositive motion is clearly consistent with the Constitution and laws of the United States. And although not mentioned by the government in its papers, even though the local rules preclude a magistrate judge from ruling on a criminal motion once that motion is calendared before the district court, *see* Local Criminal Rule 57.3, Mr. Gastelum filed his limited discovery and preservation motions before this Court well before his case received designation to a district judge. There is nothing in the local rules that prevents this Court from ruling on Mr. Gastelum's limited motions.

Additionally, due process requires that Mr. Gastelum be able to file such motions before this Court. The position of a magistrate judge was developed to ease the burden on Article III judges. *See Peretz v. United States*, 501 U.S. 923, 928 (1991). Noteworthy as that goal may be, where the designated duties and responsibilities of a magistrate judge act in such a way to deny a criminal defendant of his or right to due process, those responsibilities must be construed in such a way as to comport with due process. *See*, *e.g.*, *United States v.*

Ridgeway, 300 1153, 1155-57 (9th Cir. 2002) (although district court may *adopt* a magistrate judge's recommendation regarding a suppression motion without rehearing testimony, due process requires that a district court rehear suppression hearing testimony in order to *reject* magistrate judge's recommendation).

Against this backdrop, constitutional concerns demand that Mr. Gastelum's motions be heard by this Court. As a manner of convenience to the district judges in this district, magistrate judges are authorized to conduct arraignments in a criminal case. Crim. L.R. 57.3 (c)(1). As a practical matter, this means that there will be, at a minimum, a ten-day delay before a district judge is assigned to any particular criminal case. *See* Fed. R. Crim. P. 5.1 (c). Following this minimum delay of ten days, there is (by practice) a further delay of a month or more before a motion hearing is held before the district court. In most cases, this is all well and good. However, in cases where preservation of evidence and limited discovery decisions must be made expeditiously in order to preserve the evidentiary value of a person or thing, magistrate judges must be able to enter protective orders to ensure a defendant's due process right to fair trial, as well as his or her rights under the Sixth Amendment.

Nor is such an order unknown in this district. Indeed, one such order, made by Magistrate Judge Ruben B. Brooks, was signaled out by a Ninth Circuit judge as completely appropriate under the circumstances of that case: "The magistrate judge was not satisfied with the government's assurances that it picked the best witnesses for the defense, nor was he cowed by fears that Mexico might send a regiment of Federales to rescue the aliens. Rather, he did the entirely sensible thing -- he ordered the aliens detained long enough for defense counsel to talk to them." *United States v. Ramirez-Lopez*, 315 F.3d 1143, 1168 (9th Cir. 2003) (Kozinski, J., dissenting), *opinion withdrawn following government's dismissal of the case*, 327 F.3d 829 (9th Cir. 2003).

In sum, this Court has the power to hear Mr. Gastelum's motions. Mr. Gastelum's requests are limited and reasonable and tailored to the facts of his case. The Court should grant them.

III.

CONCLUSION

Mr. Gastelum requests this Court consider this reply when deciding his previously filed motions.

Respectfully submitted,

/s/ Robert H. Rexrode

Dated: June 18, 2008

ROBERT H. REXRODE, III
Attorney for Mr. Gastelum
robert_rexrode@rexrodelawoffices.com

ROBERT H. REXRODE, III
California State Bar No. 230024
427 C Street, Suite 300
San Diego, California 92101
Telephone: (619) 233-3169, ext. 13
Facsimile: (619) 684-3553
robert_rexrode@rexrodelawoffices.com

Attorney for Mr. Jose Baudilo Gastelum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

(**HONORABLE PETER C. LEWIS**)

UNITED STATES OF AMERICA, Plaintiff, v. JOSE BAUDILIO GASTELUM, Defendant.	CASE NO. 08mj8509 PROOF OF SERVICE

Counsel for Defendant certifies that the foregoing pleading is true and accurate to the best of his information and belief, and that a copy of the foregoing document has been served via CM/ECF and email this day upon:

Charlotte Kaiser, Assistant United States Attorney
charlotte.kaiser@usdoj.gov
John Weis, Assistant United States Attorney
john.weis@usdoj.gov

Respectfully submitted,

/s/ Robert H. Rexrode

Dated: June 18, 2008

ROBERT H. REXRODE, III
Attorney for Defendant
robert_rexrode@rexrodelawoffices.com